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No. 89-1067

In The

Supreme Court of the United States

October Term, 1989

GENERAL MOTORS CORPORATION,

Petitioner,

vs.

MARY R. WELLS, ET AL,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RICHARD C. ROBERTS III
Counsel of Record
814 North President Street
Post Office Box 55882
Jackson, Mississippi 39296-5882
(601) 353-9455

EDWARD J. CURRIE, JR.
WHITMAN B. JOHNSON, III
STEEN, REYNOLDS, DALEHITE & CURRIE
Post Office Box 900
Jackson, Mississippi 39205-0900
(601) 969-7054

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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QUESTIONS PRESENTED FOR REVIEW

Respondents are former employees of the Packard Electric Division of General Motors ("GM") located in Clinton, Mississippi. The employees in Clinton are represented by Local 698 of the International Union of Electrical, Radio and Machine Workers AFL-CIO ("IUE"). In 1982, GM and the IUE negotiated and implemented an incentive attrition plan which came to be known as the Voluntary Termination of Employment Plan ("VTEP"). Pursuant to VTEP, employees were offered the opportunity to sell their seniority and concomitant rehire rights in exchange for a set monetary payment. Each of the Respondents applied for and accepted the VTEP payment.

Respondents claim that GM fraudulently induced them, on an individual basis, wholly apart from any aspect of the collective bargaining process, to apply for and accept the VTEP payment. Respondents allege that GM falsely represented to them that acceptance of the VTEP payment would have no effect on their being considered for future employment opportunities, if any, just as other applicants for employment with similar experience and qualifications.

In late 1985 and early 1986, Respondents learned for the first time that GM would not even consider them for re-employment solely because they had accepted the VTEP payment.

Respondents make no complaint about the terms of VTEP nor the terms of any other locally or nationally bargained agreement. They do not contend that GM

QUESTIONS PRESENTED – CONTINUED

breached any contractual duty owed to them under VTEP. They do not complain of any underpayment or denial of payment. They do not complain that VTEP was administered in any improper way. They do not claim that any information was withheld from their bargaining agent that affected any rights they had under VTEP or any other collectively bargained agreement. They do not point to any provision in VTEP as the basis of their claims, either directly or indirectly, nor do they question the interpretation of any word, phrase or provision of VTEP.

The questions presented for review are:

1. Is the conduct in issue, that is, GM's false representations that the Respondents would be considered for future employment opportunities on the same basis as other applicants for employment with similar experience and qualifications, arguably prohibited by the National Labor Relations Act?

2. Even assuming that GM's conduct in making false representations is arguably prohibited by the NLRA, does such conduct fall within a recognized exception to *Garmon* pre-emption?

3. Focusing clearly on the conduct in issue, are Respondents' claims of fraud derived from or substantially dependent upon an analysis of the VTEP so that such claims are pre-empted by Section 301 of the Labor Management Relations Act?

QUESTIONS PRESENTED – CONTINUED

4. Do Respondents' claims of fraud relate to an employee welfare benefit plan established or maintained for the purpose of providing its participants with one or more of the benefits listed in the Employee Retirement Income Security Act, so that ERISA pre-emption would apply?

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

A. Background 1

B. GM's Misstatements of Fact 4

SUMMARY OF ARGUMENT FOR DENYING THE PETITION 7

ARGUMENT 8

I. The Court of Appeals Properly Applied the Ratinale of *Garmon* and Its Progeny to the NLRA Pre-Emption Issues, and Its Opinion is Consistent With Those Decisions and the Decisions of Other Courts of Appeal 8

A. The misrepresentations challenged by Respondents relate to an issue that is not a mandatory subject of bargaining, and even if it were, GM failed to prove that there was a demand for bargaining on the issue 9

B. The court of appeals correctly applied appropriate principles from *Davis* and held that GM failed to meet its burden of proving that the conduct in issue was arguably prohibited 11

C. Even if the court of appeals had concluded that the conduct in issue was arguably prohibited, *i.e.*, that eligibility for future employment was a mandatory subject of bargaining and that GM met its burden of proving that it arguably failed or refused to bargain in good faith, such conduct would nevertheless fall within a recognized exception to *Garmon* pre-emption 14

TABLE OF CONTENTS – Continued

Page

II. The Court of Appeals Correctly Applied the Principles of Section 301 Pre-Emption and Its Opinion is Consistent With the Decisions of Other Courts of Appeal 17

A. The rule of Section 301 pre-emption and its rationale 17

B. The rule of Section 301 pre-emption was properly applied 19

C. The courts of appeal are applying the rules of Section 301 pre-emption consistently to the specific facts and claims presented by each case 21

III. The Court of Appeals Properly Applied the Principles Governing Pre-Emption by ERISA Set Forth in *Fort Halifax* 24

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES:

Allis-Chalmers Corp. v. Lueck, 471 U.S. 201 (1985) 7, 17, 18, 19

Anderson v. Ford Motor Co., 803 F.2d 953 (8th Cir. 1986) 16

Automobile Workers v. Russell, 356 U.S. 634 15

Bale v. General Telephone Co., 795 F.2d 775 (9th Cir. 1986) 23

Belknap, Inc. v. Hale, 463 U.S. 491 (1982) 8, 9, 12

Berda v. CBS, Inc. 881 F.2d 20 (3rd Cir. 1989) *cert. denied*, ___ U.S. ___ (1990) 23

Berkline Corp. v. Bank of Mississippi, 453 So.2d 699 (Miss. 1984) 9, 17

Caterpillar v. Williams, 482 U.S. 386 (1986) 18, 19, 20

Chmiel v. Beverly Wilshire Hotel Co., 873 F.2d 1283 (9th Cir. 1989) 22

DeLapp v. Continental Can Co., Inc., 868 F.2d 1073 (9th Cir. 1989) 22

Electrical Workers v. Hechler, 481 U.S. 851 (1987) 18

Farmer v. Carpenters, 430 U.S. 290 (1977) 8, 9, 15

Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987) 7, 17, 24, 25

Garrison v. Louisiana, 379 U.S. 74 15

Gray v. Operating Engineers, 778 F.2d 1087 (5th Cir. 1985) 16

TABLE OF AUTHORITIES – Continued

Page

International Longshoremen v. Davis, 476 U.S. 380 (1986) 7, 9, 11, 12, 13

Lingle v. Norge Div. of Magic Chef, Inc. ___ U.S. ___, 108 S. Ct. 1877 (1988) ..... *passim*

Linn v. Plant Guard Workers, 383 U.S. 53..... 13, 15

Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976) 8

Malone v. White Motor Corp., 435 U.S. 497 (1978).. 17, 24

Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985) 24

Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971) 8, 15, 23

N.L.R.B. v. Borg-Warner Corp., 356 U.S. 342 (1958) 10

N.L.R.B. v. Katz, 369 U.S. 736, 743 (1962)..... 11

Operating Engineers v. Jones, 460 U.S. 669 (1983) 12

Pane v. RCA Corp., 667 F.Supp 168 (D.N.J. 1987)..... 25

Pane v. RCA Corp., 868 F.2d 631 (3rd Cir. 1989)...25, 26

Retail Clerks v. Schermerhorn, 375 U.S. 96 (1963)..... 17

San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) ..... *passim*

Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180 (1978) 9, 12, 15, 16

Shaw v. Delta Airlines, Inc., 463 U.S. 85 (1983) 26

Teamsters v. Lucas Flour Co., 369 U.S. 103 (1962) 18

Windfield v. Dover Corporation, 890 F.2d 764 (5th Cir. 1989) 12

STATEMENT OF THE CASE

A. Background.

In the early 1980's the domestic automobile industry experienced a severe downturn. The decreased demand for domestic automobiles caused great economic problems for the Packard Division which produces electrical wiring harnesses for GM automobiles. GM's competition was performing final assembly work on the wiring harnesses at a rate ranging from $6.00 to $9.00 per hour. GM's cost was approximately $19-$21 per hour. To address this competitive disadvantage, GM developed a "Plan to Compete" for the entire Packard Division. One of the strategies in the Plan to Compete was to move final assembly work to Mexico in order to take advantage of lower wage rates. The obstacle to this strategy was that Packard had several hundred employees on layoff, who enjoyed contractual *rehire* rights[1] for up to seven years.

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[1] The distinction must be maintained between "rehire" rights and "eligibility for future employment". Respondents possessed "rehire" rights solely by virtue of the collective bargaining agreement. GM bargained and paid for the relinquishment of Respondents' rehire rights. Respondents understood that they were selling their rehire rights and all other rights they enjoyed by virtue of seniority under the collective bargaining agreement. Respondents are not complaining about any conduct relating to the relinquishment of their rehire rights. Respondents are claiming that they were fraudulently induced to give up their "eligibility for future employment." Eligibility for future employment is not derived from any collective bargaining agreement. As a concept, it is the right any person has to step up to the personnel window, ask for an employment application, and have that application evaluated on its merits. Even though GM has persistently tried to run

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Packard's established past practice prohibited the outsourcing of work to Mexico as long as employees with rehire rights were on layoff. Packard's past practice, however, allowed them to move jobs vacated as a result of natural attrition, such as voluntary quits, to Mexican plants which paid lower wage rates. VTEP was developed and instituted to accelerate attrition through voluntary quits. VTEP was simply a vehicle to remove employees from layoff by purchasing their seniority and concomitant contractual rehire rights. Employees who accepted the VTEP payments would be treated as voluntary quits, which, under the contract, is a break in seniority and a forfeiture of rehire rights.

The VTEP was first implemented in Warren, Ohio. In October, 1982, the JOBS Committee[2] in Clinton forwarded a proposed draft of the VTEP to the Bargaining Committee. In December, 1982, GM and Local 698 executed the VTEP.

In January, 1983, several weeks after the VTEP bargaining had concluded, and after the final agreement had been signed and approved by GM and Local 698, meetings were called to explain VTEP to active and laid-off employees. During these meetings, GM contends that its officials explained that Packard had no obligation to

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together these separate concepts, the Court, in evaluating the pre-emptive effect of the statutes presented, must focus clearly on the conduct actually in issue.

[2] The JOBS Committee was a joint union-management committee designed to develop joint solutions to business problems.

rehire any Packard employee who accepted VTEP benefits. This is not disputed by Respondents, nor do Respondents complain about such statements. What Respondents are complaining about is that Talmadge Portis, the Plant Manager, in response to employee questions in these January meetings, told the employees that acceptance of VTEP benefits would not preclude them from being considered from employment at any other GM plant, or even at the plant in Clinton, if business ever picked up again. Respondents claim that they were told by Mr. Portis that they would be considered for employment in the future just as any other applicant. Some of the employees testified that they were told that their prior experience would give them an advantage over other applicants.

This issue, "eligibility for future employment", had not been a subject of bargaining during the negotiations over other terms and conditions of the VTEP. The statements concerning eligibility for future openings were made in a context wholly unrelated to the bargaining process and did not hinder the Respondents' statutory collective-bargaining rights in any way. The statements did not represent an attempt to unlawfully by-pass the Respondents' exclusive bargaining representation. The statements (which Respondents later learned were false) were made simply to induce individual employees, (in making their uniquely individual decisions) to accept the payments available under the VTEP, as opposed to collective acceptance of the VTEP itself.

GM's representations concerning eligibility for future job openings, if any, was consistent with GM's characterization of employees who accepted VTEP as voluntary

quits. Employees who had quit in the past had never been prevented from seeking future employment, and, in fact, some had been successful in being reemployed. Therefore, GM's representations regarding eligibility for future employment did not constitute a change in GM policy.

In late 1985 and early 1986, Respondents learned for the first time that they would not even be considered for employment at GM because they had accepted VTEP benefits. Thereafter, Respondents filed these lawsuits claiming fraudulent and negligent misrepresentation in violation of state law. In summary, the complaints charge: (1) GM, through its agents, made false representations that VTEP acceptees would be considered for future employment; (2) GM knew these representations were false at the time they were made; (3) Respondents had a right to rely upon these representations in making their individual decisions whether or not to accept VTEP; (4) Respondents actually relied upon these representations in making their decisions; and (5) Respondents suffered injury because of their reliance.

B. GM's Misstatements of Fact.

A misstatement of fact serves as a linchpin of Petitioner's arguments. Petitioner states on Page 3 of its Petition: "It is undisputed that the question of whether employees who accepted VTEP benefits would be eligible for reemployment with GM was discussed during the negotiations."

Petitioner's statement is simply not true.[3] This statement is illustrative of GM's continued efforts to run together the separate concepts of "rehire" rights and "eligibility for future employment".

This case was presented to the district court on GM's Motion for Summary Judgment. GM submitted affidavits and excerpts from deposition testimony to show that relinquishment of rehire rights was a subject of bargaining. While Respondents readily conceded that the *rehire* rights they enjoyed by virtue of their seniority was the subject of negotiation, their rights as non-employee applicants for future jobs openings was never discussed. GM presented no contrary evidence on this issue. The district court stated:

> GM submits that during the negotiating process over the VTEP, its negotiating team clearly informed the union's bargaining committee that employees that accepted VTEP benefits would not be considered for rehire if GM's financial picture ever improved. Plaintiffs, however, argue that even if the issue of eligibility for rehire had been discussed during the course of the negotiations, the Plaintiffs' right to seek future employment with the company was never an issue in the bargaining process and was neither

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[3] In support of its misstatement of fact, GM cites to a portion of the appeal court's decision that was discussing *GM's version of the facts*. This Court must understand that context. In other words, the court of appeals noted that *GM was claiming* that "[Respondents] and their union claim[ed] that the representatives asked about future eligibility and were told that would be 'no problem' ". Pet. 3, n. 1. Such contention is not supported by the record evidence, nor the briefs presented in the courts below.

> discussed nor included in the VTEP. According to Plaintiffs, the conduct at issue in the case at bar was not the subject of bargaining, was not a term of the VTEP, and was not part of the underlying collective bargaining agreement; the conduct, they claim, is GM's having made fraudulent representations to individual employees, wholly apart from any aspect of the collective bargaining process, in an attempt to prevail upon individual employees to apply for and accept the benefits of VTEP.

Pet. App. 30a-31a.

Both courts below reached the factual conclusion on the record evidence that eligibility for future employment was *not* a subject of bargaining. The district court said:

> The fact that the matter at issue here, eligibility for future employment, in retrospect *could have been and perhaps should have been* included within such a termination plan does not render that topic *a fortiori* a mandatory subject of bargaining.

Pet. App. 32a. (Emphasis added). (Also quoted by court of appeals, Pet. App. 6a.)

The petition contains one other gross misstatement of fact:

> "To begin with, it is beyond dispute that Respondents' claims owe their existence to the VTEP Agreement."

Pet. at 19. To the contrary, Respondents' right to be free from fraud is derived solely from state law, not from any agreement between the parties. The false statements which gave rise to Respondents' claims were made in a context wholly unrelated to the VTEP agreement.

SUMMARY OF ARGUMENT FOR DENYING THE PETITION

The facts in this case are unique in both genus and specie. Acknowledging that "the dispute is a highly fact-bound one" (Pet. App. 14a) the court of appeals correctly applied the principles set forth in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), and *International Longshoremen v. Davis*, 476 U.S. 380 (1986), and held that GM had failed to meet the burden of proving in its Motion for Summary Judgment that the conduct in dispute is arguably protected or prohibited by the NLRA. The decision by the court of appeals does not conflict with the decision of any other court of appeals in result or rationale.

The district court and the court of appeals properly applied the test for pre-emption under Section 301 announced by this Court in such cases as *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 201 (1985), and *Lingle v. Norge Div. of Magic Chef, Inc.* ___ U.S. ___, 108 S. Ct. 1877 (1988), and found that the claims presented by Respondents were not pre-empted by federal labor-contract law. The appeal court decisions cited by Petitioner are factually distinct from the case at bar, and from one another, and present no conflict in law for this Court to resolve.

Based upon the facts presented for consideration by the parties in support of and in opposition to the Motion for Summary Judgment, both the district court and the court of appeals, properly applied this Court's decision in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), and held that VTEP did not constitute an "employee benefit plan" within the meaning of ERISA.

ARGUMENT

I. The Court of Appeals Properly Applied the Rationale of *Garmon* and Its Progeny to the NLRA Pre-Emption Issues, and Its Opinion is Consistent With Those Decisions and the Decisions of Other Courts of Appeal.

Garmon[4] sets forth one of two doctrines[5] announced by this Court for determining whether state causes of action are pre-empted by the NLRA. *Belknap, Inc. v. Hale*, 463 U.S. 491, 498 (1982). Under *Garmon*, state law causes of action are presumptively pre-empted if they challenge conduct that is actually or arguably protected[6] or prohibited by the Act. Even if the conduct in issue is arguably prohibited, however, the state law cause of action may nevertheless be maintained "if the behavior to be regulated is behavior that is of only peripheral concern

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[4] *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

[5] The second pre-emption doctrine is set out in *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976) which proscribes state regulation of conduct that was intended by Congress to remain a part of the self help remedies available to parties in labor disputes. *Machinists* pre-emption is not in issue. The Court has also refused to apply the pre-emption doctrine "where the particular rule of law sought to be invoked before another tribunal is so structured and administered that in virtually all instances it is safe to presume that judicial supervision will not disserve the interests promoted by federal labor statutes." *Farmer v. Carpenters*, 430 U.S. 290, 297, *citing, Motor Coach Employees v. Lockridge*, 403 U.S. 274, 297-298 (1971).

[6] Petitioner has abandoned the contention asserted in the courts below that its conduct was arguably protected, in addition to being arguably prohibited.

to the federal law or touches interests deeply rooted[7] in local feeling and responsibility." *Belknap, Inc. v. Hale, supra,* at 498, *citing, Farmer v. Carpenters,* 430 U.S. 290, 296-297 (1977); *Sears, Roebuck & Co. v. Carpenters,* 436 U.S. 180, 200 (1978); *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 243-244 (1959).

This Court has flatly rejected the notion that *Garmon* must be applied in a "literal, mechanical fashion." *Sears, Roebuck & Co. v. Carpenters, supra,* at 188. *Accord, Farmer v. Carpenters, supra,* at 188.

The Court has also made it clear that the party claiming pre-emption bears the burden of proof on the issue. *International Longshoremen's Ass'n v. Davis,* 476 U.S. 380, 395 (1986).

A. The misrepresentations challenged by Respondents relate to an issue that is not a mandatory subject of bargaining, and even if it were, GM failed to prove that there was a demand for bargaining on the issue.

GM presented two arguments to the circuit court to support its claim that its own conduct was arguably prohibited by the NLRA. First, according to GM, Respondents were challenging GM's good faith in bargaining over the future eligibility issue. According to GM, GM either failed or refused to bargain over the issue; and, the

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[7] The Mississippi Supreme Court has specifically held that accountability for fraudulent inducement is a notion "running deep in our law". *Berkline Corp. v. Bank of Mississippi,* 453 So.2d 699, 702 (Miss. 1984).

issue is a mandatory subject of bargaining which necessitated negotiation before changes[8] could be implemented. Pet. App., 5a.

Factually, both courts below concluded that the issue had not been the subject of bargaining. Both courts concluded, "the fact that the matter at issue here, eligibility for future employment, in retrospect could have been and perhaps should have been" a subject of bargaining during the negotiations over the VTEP terms, did not render that subject *a fortiori* a mandatory subject of bargaining.

The circuit court concluded that an employer's right to evaluate and consider individual applicants for employment lies "at the very core of entrepreneurial control". Pet. App. 6a. As such, the issue would not be a mandatory subject of bargaining, and any failure to bargain over a non-mandatory subject is not arguably prohibited by Section 8(a)(5). *See, N.L.R.B. v. Borg-Warner Corp.*, 356 U.S. 342 (1958).

GM admits in its Petition that "[i]t may indeed be the case that evaluation of completely *new* applicants for employment 'lies at the very core of entrepreneurial control. . . .' " Pet., 14. It must be remembered that the

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[8] Although the court of appeals did not address the issue, it should be noted that the alleged misrepresentations regarding eligibility for future employment did not represent a change or modification of GM's current policy. That is, voluntary quits had always been allowed to reapply for future job openings and that is exactly what they were told would continue to be the policy. Only proposed changes in mandatory subjects require bargaining. If there is no proposed change, there is no failure or refusal to bargain in violation of Section 8(a)(5).

alleged misrepresentations, even though made to current active and laid-off employees, concerned their rights as "new applicants". Thus, GM has tacitly admitted that the conduct in issue concerned a non-mandatory subject of bargaining. The two NLRB decisions cited by the Petitioner do not support a contrary view.

The court of appeals went on to state that even if future employment eligibility were a mandatory subject of bargaining, the duty to bargain over that subject "was not triggered unless and until there was a clear and unequivocal demand for bargaining by the union." Pet. App. 7a. n. 6, *citing, N.L.R.B. v. Katz*, 369 U.S. 736, 743 (1962). This is another rationale supporting the result reached by the circuit court, since GM totally failed to meet its burden of proving that there had been such a demand.

B. The court of appeals correctly applied appropriate principles from *Davis* and held that GM failed to meet its burden of proving that the conduct in issue was arguably prohibited.

The second argument presented to the court of appeals by GM was the odd assertion that its own conduct was arguably prohibited by the NLRA. Applying *Davis*, the court of appeals held that GM had failed to meet its burden on the issue. GM would have this Court believe that the appeal court's application of *Davis* to the facts of this case has effectively "abolished" the arguably prohibited branch of *Garmon*. Pet., 10. A dispassionate reading of the opinion below, however, shows that the alarm sounded by Petitioner is a false one.

In a decision issued not long after the one at bar, the Fifth Circuit had yet another occasion to examine the *Garmon* pre-emption rule for activities that are "arguably prohibited" by the NLRA. *Windfield v. Dover Corporation*, 890 F.2d 764 (5th Cir. 1989). The conduct in issue in *Windfield* was a written personal guarantee of continued employment given to an employee by the company during a union organizing campaign. After the union lost the representation election, the employee was terminated. The union filed unfair labor practice charges with the NLRB alleging violations of Sections 8(a)(1) and 8(a)(3) of the NLRA. After the NLRB refused to issue a complaint, the employee filed suit in Mississippi state court alleging fraud. Although the court did not cite *Davis, supra*, 476 U.S. 380 (1986), it is clear from the opinion that the conduct in issue was "arguably prohibited" by the NLRA. Thus, the court proceeded to apply the analytical framework established by the *Sears/Jones/Belknap*[9] line of cases to determine the appropriateness of pre-emption. Obviously, contrary to Petitioner's contentions, the arguably prohibited branch of *Garmon* pre-emption has not been abolished, but is alive and well.

GM's overstatement of the court of appeals' ruling is evident from the following statement in its Petition:

> In fact, the court of appeals' reformulation of *Garmon* would not be met even in cases where the conduct alleged was *actually* (rather than arguably) prohibited by the Act.

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[9] *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1977); *Operating Engineers v. Jones*, 460 U.S. 669 (1983); *Belknap v. Hale*, 463 U.S. 491 (1983).

Pet., 11. *Garmon* makes it clear that conduct which is actually prohibited is pre-empted. No further analysis is required. *Davis* addresses the next step in the analysis by providing a definitional framework for the term "arguably prohibited". In *Davis*, the Court said:

> If the word 'arguably' is to mean anything, it must mean that *the party claiming pre-emption is required to demonstrate that his case is one that the Board could legally decide in his favor.* That is, a party asserting pre-emption must advance an interpretation of the Act that is not plainly contrary to its language and that has not been 'authoritatively rejected' by the courts or the Board. *The party must then put forth enough evidence to enable the court to find that the Board reasonably could uphold a claim based on such an interpretation.*

476 U.S. at 395 (citations omitted, emphasis added).

The Court's allocation of the burden of proof in *Davis* prevents either party from utilizing the NLRA as a safe haven for the consequences of state law violations. The decisions of this Court amply demonstrate that Congress never intended to provide such a safe haven. For example, the Court stated in *Linn v. Plant Guard Workers*:

> [Neither] party [has] license to injure the other intentionally by circulating defamatory or insulting material known to be false. . . . In such case the one issuing such material *forfeits his protection* under the Act.

83 U.S. 53, 61 (1965). (citations omitted).

The court of appeals expressed it as follows:

> [A]s the court explains in the passage quoted above [from *Davis*] the party attempting to invoke the Board's jurisdiction must then demonstrate that the Board could reasonably uphold that party's claim. The reason for this requirement is simple and instructive here; the exclusivity of the Board's administrative province, made necessary by the need for uniform treatment in labor disputes, *may not serve as a shelter for those whose claims have no realistic chance of acceptance and no import for national labor policy.*

Pet. App. 9a.

C. Even if the court of appeals had concluded that the conduct in issue was arguably prohibited, *i.e.*, that eligibility for future employment was a mandatory subject of bargaining and that GM met its burden of proving that it arguably failed or refused to bargain in good faith, such conduct would nevertheless fall within a recognized exception to *Garmon* pre-emption.

Even if the conduct in issue is arguably prohibited, it fits into at least two[10] exceptions to *Garmon* pre-emption.

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[10] As noted earlier, even if eligibility for future employment was a mandatory subject of bargaining, only changes in current policy require bargaining, and then, only after an unequivocal demand for bargaining. Neither factor was proved by GM.

Also, since Mississippi law requires that fraud be proved by clear and convincing evidence, "in virtually all instances it is safe to presume that judicial supervision will not disserve

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First and foremost of these would be the Court's refusal to pre-empt state-court jurisdiction over conduct that touches "interest so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." *Garmon, supra,* at 244. *See, Automobile Workers v. Russell,* 356 U.S. 634 (violence); *Linn v. Plant Guard Workers,* 383 U.S. 53 (libel); *Farmer v. Carpenters,* 430 U.S. 290 (intentional infliction of mental distress); *Sears, Roebuck & Co. v. Carpenters,* 436 U.S. 180 (trespass).

In *Sears, supra* at 196-197, the Court identified those factors which have warranted a departure from the general pre-emption guidelines in "local interests" cases under the arguably prohibited branch of the *Garmon* doctrine:

> First, there existed a significant state interest in protecting the citizen from the challenged conduct. Second, . . . the exercise of state jurisdiction over the tort claim entailed little risk of interference with the regulatory jurisdiction of the Labor Board. Although the arguable federal violation and the state tort arose in the same factual setting, the respective controversies presented to the state and federal forums would not have been the same.

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the interest promoted by federal labor statutes." *Farmer v. Carpenters, supra* at 297, *citing, Motor Coach Employees v. Lockridge,* 403 U.S. 274, 297-298 (1971). *See also, Garrison v. Louisiana,* 379 U.S., 74, 75 ("[T]he use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social or political change is to be effected.")

> . . . For it is only in the [identical controversy] situation that a state court's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the Board which the arguably prohibited branch of the *Garmon* doctrine was designed to avoid.

As the court of appeals noted, "The challenged conduct here was not an attempt on the part of GM to interfere with the collective bargaining process or to diminish the union's representative role; instead, it was a post-bargaining effort to induce individual employees to accept VTEP benefits." Pet. App. 9a. GM's misrepresentations had nothing whatsoever to do with the collective bargaining process, nor were they made in order to obtain ratification or approval of the VTEP agreement. The parties to the collective bargaining process, both the company and the union, had totally fulfilled their roles. The misrepresentations were made to individual employees and involved their *uniquely individual decisions* as to whether they should accept the VTEP benefit. Thus, this case clearly falls within the "non-identical controversy" exception to *Garmon* explained in such cases as *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1977).

Another recognized exception to *Garmon* pre-emption of conduct that is arguably prohibited is for activity which is merely a "peripheral concern" of the Labor Management Relations Act. *Garmon, supra* at 296. The prevention of fraud is only a "peripheral concern" of federal labor law. *See, e.g., Anderson v. Ford Motor Co.*, 803 F.2d 953 (8th Cir. 1986), *cert. denied*, 483 U.S. 1011 (1987); *Gray v. Operating Engineers*, 778 F.2d 1087, 1090 (5th Cir. 1985). On the contrary, however, it is a notion "running

deep" in the law of Mississippi. *Berkline Corp. v. Bank of Mississippi*, 453 So.2d 699, 702 (Miss. 1984).

II. The Court of Appeals Correctly Applied the Principles of Section 301 Pre-Emption and Its Opinion is Consistent With the Decisions of Other Courts of Appeal.

A. The rule of Section 301 pre-emption and its rationale.

The question whether this or any other state action is pre-empted by federal labor-contract law is one of congressional intent. " 'The purpose of Congress is the ultimate touchstone.' " *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1984), *quoting, Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978), *quoting, Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963). Since Congress did not explicitly state to what extent it intended § 301 of the LMRA to pre-empt state law, local regulation is sustained " 'unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States.' " *Lueck, supra* at 209, *quoting, Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978).

This Court has emphasized that " 'pre-emption should not be lightly inferred . . . since the establishment of labor standards falls within the traditional police power of the State.' " *Lingle v. Norge Div. of Magic Chef, Inc.*, 108 S.Ct. 1877, 1885, *quoting, Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987).

In this case, the § 301 pre-emption issue is determined by the rule set out in *Lueck, supra*, as refined by *Lingle, supra*. Succinctly stated, the rule is that "Section 301 governs claims founded directly on rights created by collective-bargaining agreements, and also claims 'substantially dependent on analysis of a collective-bargaining agreement.' " *Caterpillar v. Williams*, 482 U.S. 386, 394 (1986) *quoting, Electrical Workers v. Hechler*, 481 U.S. 851, 859 n. 3 (1987); *and citing, Allis-Chalmers v. Lueck*, 470 U.S. 202, 220 (1985).

The rationale for the rule was first set forth in *Teamsters v. Lucas Flour Co.*, 369 U.S. 103 (1962) where the court explained:

> The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.

Id., at 103.

In delineating the scope of § 301 pre-emption the Court has cautioned:

> [N]ot every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301 or other provisions of the federal labor law. . . . In extending the pre-emptive effect of § 301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.

Lueck, supra at 211-212, *quoted in, Caterpillar, Inc. v. Williams*, 482 U.S. 386, 395 (1987) *and in, Lingle v. Norge Div. of Magic Chef, Inc.*, 108 S.Ct. 1877, 1883-1884 n. 10, 1885 n. 12 (1988).

The bottom line is that this Court has determined that Congress intended to pre-empt the application of state law *"only if such application requires the interpretation of a collective-bargaining agreement." Lingle, supra* at 1885, (Emphasis added). Such rule "is consistent both with the policy of fostering uniform, certain adjudication of disputes over the meaning of collective-bargaining agreements and with cases that have permitted separate fonts of substantive rights to remain unpre-empted by other federal labor-law statutes." *Id.*, at 1884.

B. The rule of Section 301 pre-emption was properly applied.

Both courts below recognized that Respondents' state-law fraud claims do not fall within the rule of § 301 pre-emption. Respondents' state-law claims are completely "independent" of the VTEP "in the sense of 'independent' that matters for § 301 pre-emption purposes: resolution of the state-law claim does not require construing the collective-bargaining agreement." *Lingle, supra,* at 1882.

Respondents do not dispute any of the terms of VTEP. Respondents do not look to VTEP as the source of their claims or to support their claims. No provision in the VTEP provides a defense to Respondents' claims. Respondents do not urge an interpretation one way or

another regarding any provision of VTEP. Not one element in their state-law claim for fraud "requires a court to interpret any term of a collective-bargaining agreement." *Id.* Stated another way, if Respondents had brought a lawsuit under § 301, what provision of VTEP could they point to as having been breached? What term could they look to as supporting or defeating their claim? What provision could they ask the court to enforce? Obviously, the answer is that there is no such provision. Consequently, the court of appeals was correct in its conclusion that pre-emption under § 301 was not appropriate.

The court of appeals noted that GM's arguments for § 301 pre-emption were flawed because, "the argument rests upon an unsound premise: namely, that the Plaintiffs' claim is that GM's representatives fraudulently misrepresented what was in the contract." Pet. App. 14a. As in *Caterpillar*, GM has attempted to create the prerequisites for pre-emption by "ignoring the set of facts . . . presented by Respondents, along with their legal characterization of those facts. . . ." *Caterpillar, Inc. v. Williams*, *supra* at 397. Also as in *Caterpillar*, GM has "[failed] to recognize that a plaintiff covered by a collective-bargaining agreement is permitted to assert legal rights *independent* of that agreement, including state-law contract rights, so long as the contract relied upon is *not* a collective-bargaining agreement." *Id.*, at 396. *Accord*, *Lingle*, *supra* at 1883 ("[A]s long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for § 301 purposes.")

The court of appeals was correct in making the following conclusion concerning the § 301 pre-emption issue:

> [R]esolution of the Plaintiff's claims is not inextricably intertwined with the agreement in the sense described by the *Lueck/Hechler/Lingle* line of cases. *Under these narrow circumstances,* the rationale supporting Section 301 pre-emption, *i.e.,* avoiding the danger of inconsistent interpretations of collectively-bargained labor agreements, is not at work.

Pet. App. 18a. (Emphasis added).

C. The courts of appeal are applying the rules of Section 301 pre-emption consistently to the specific facts and claims presented by each case.

Petitioner would have this Court believe that the courts of appeal are "hopelessly divided" on whether § 301 pre-empts state law fraud and misrepresentation claims. Respondents submit that this is not the case at all.

In support of its conclusion that there is a conflict in the circuits, Petitioner first seeks to establish the premise that the cases can be lumped into one broad category labeled "extra-contractual/extraneous promises". Pet., 20. Building on this premise, Petitioner next states that the Third, Eighth and Fifth Circuits hold that "such claims" are not pre-empted. Pet., 21. On the other hand, Petitioner asserts that "such claims" are pre-empted by the Ninth and Eleventh Circuits. Pet., 22. Finally, Petitioner seeks to heap conflict upon conflict by stating that in the Eleventh Circuit the resolution of "such claims" depends upon whether the extra-contractual promise was

made when the employee was a member of the bargaining unit. Pet., 22.

Petitioner's tautological conclusion that a conflict exists in the circuits is drawn from a faulty premise. Contrary to Petitioner's assertion, the Section 301 pre-emption cases cited by the Petitioner simply cannot be lumped into one broad category labeled "extraneous promises cases", which on that basis alone, either are or are not pre-empted by the courts of appeal.

Significantly, eight of the ten cases cited by Petitioner were decided before *Lingle*.[11] Respondents submit that *Lingle* virtually eliminated any confusion that may have existed concerning the rule of § 301 pre-emption.

Even prior to *Lingle*, however, it is abundantly clear that the courts below have been faithfully asking the correct question in each of the § 301 pre-emption cases; *i.e.*, does the state law claim depend upon an interpretation of the collective-bargaining agreement for its resolution? Granted, some of the cases have reached seemingly different results on fact patterns that were similar in some respects. Upon inspection, however, it is clear that in each case the decision rested upon the interplay between the specific elements of the cause of action alleged under that state's law, and the specific facts presented, particularly, the terms of the collective bargaining agreement. *E.g.*, *DeLapp v. Continental Can Co., Inc.*, 868 F.2d 1073, 1075 (9th Cir. 1989) ("We conclude that *DeLapp*'s state claim is

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[11] One of those, *Chmiel v. Beverly Wilshire Hotel Co.*, 873 F.2d 1283 (9th Cir. 1989), was actually decided after *Lingle*, but was argued three months before *Lingle* was decided.

pre-empted by federal labor law because the provision in the collective bargaining agreement governing the early pension benefit program must be interpreted to resolve the claim."); *Bale v. General Telephone Co.*, 795 F.2d 775 (9th Cir. 1986) (Contract definition of "temporary employee" governed dispute).

In *Berda v. CBS, Inc.* 881 F.2d 20 (3rd Cir. 1989), *cert. denied*, ___ U.S. ___ (1990), the court discussed the ostensible differences in some of the cases cited by Petitioner, and came to the following conclusion:

> All these courts have agreed that the claims are pre-empted to the extent that they 'substantially depend' on the interpretation of a collective bargaining agreement. However, the courts have differed on the more particular question whether in fact there would be substantial dependence in the case before them.

Id., at 25.

Obviously, not every factual scenario presents an easy answer when the Section 301 pre-emption test is applied. The test, however, is clear.[12] The circuits are not

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[12] In *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 289-290 (1971), this Court said:

> [W]e [cannot] proceed on a case-by-case basis to determine whether each particular final judicial pronouncement does, or might reasonably be thought to, conflict in some relevant manner with federal labor policy. This Court is ill-equipped to play such a role and the federal system dictates that this problem be solved with a rule capable of relatively easy application, so that lower courts may largely police themselves in this regard.

in conflict, and the petition for certiorari should be denied.

III. The Court of Appeals Properly Applied the Principles Governing Pre-Emption by ERISA Set Forth in *Fort Halifax*.

"[A]s in any pre-emption analysis, 'the purpose of Congress is the ultimate touchstone.' " *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747 (1985) (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)). This court has examined Congress' intentions regarding ERISA pre-emption and has found that "ERISA's central focus [is] administrative integrity." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 18 (1986). As the Court explained in *Fort Halifax*:

> Congress intended pre-emption to afford employers the advantages of a uniform set of administrative procedures governed by a single set of regulations. This concern only arises, however, with respect to benefits whose provision by nature requires an ongoing administrative program to meet the employer's obligation. It is for this reason that Congress pre-empted state laws relating to *plans*, rather than simply to *benefits*.

Fort Halifax, supra, at 11.

In the case at bar, the court of appeals said:

> The operative facts in *Fort Halifax* are remarkably similar to those in the instant case. GM established a procedure by which employees could elect to receive a one-time lump payment if they ceased working at the plant. The plan was not ongoing, nor was there any need for

> continuing administration of the payment program (though employees could elect a two-year installment payment option). The fact that GM made the payments pursuant to a Voluntary Termination of Employment *"Plan"* and that the employees received a benefit do not convert the plan into an "employee benefit plan" for purposes of ERISA.

Pet. App., 20a.

Petitioner cites *Pane v. RCA Corp.*, 868 F.2d 631 (3rd Cir. 1989) as the only other court of appeals decision decided after *Fort Halifax* dealing with the issue of an "employee benefit plan" under ERISA. There, RCA, which was engaged in merger negotiations with General Electric Company, adopted an employee severance plan under which its Vice Presidents and General Managers were to receive lump sum termination benefits, provided that certain "triggering events" occurred. *Pane v. RCA Corp.*, 667 F.Supp. 168, 170-171 (D.N.J. 1987). The plaintiff, who was Vice President and General Manager of one of RCA's divisions, claimed that RCA withheld from him the benefits of the severance plan, and that, when he attempted to exercise his rights under the plan, the defendant retaliated against him. *Id.* In Count I of his complaint, the plaintiff asserted that the severance plan was an employee benefit plan within the meaning of ERISA and that defendant's conduct violated various provisions of ERISA. In Counts II, III and IV the plaintiff asserted breach of contract and tort claims under state law. The defendant moved to dismiss Counts II, III and IV on the grounds that they were pre-empted by ERISA. *Id.* The district court held that the severance plan created "an ongoing administrative system constituting an ERISA

plan," primarily because the specific provisions of the severance program required "a separate determination of each individual's eligibility for benefits." *Id.*, at 171.

The court of appeals affirmed the ruling of ERISA pre-emption and simply stated: "[The severance plan] came into being on December 8, 1985, when RCA's Board of Directors authorized the concept and RCA's management identified a potential class of participants. *It required an administrative scheme.* Thus the court correctly held that the plan for awarding severance agreements is an ERISA employee benefit plan." *Pane v. RCA Corp.*, 868 F.2d 631, 635 (3rd Cir. 1989) *cert. denied*, ___ U.S. ___ (1990) (emphasis added).

The case at bar is factually distinct from *Pane*. Here, both the court of appeals and the district court[13] concluded that there was no ongoing administrative system

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[13] The district court also concluded that ERISA pre-emption was inappropriate because the VTEP was not " established or . . . maintained for the purpose of providing its participants or their beneficiaries' those benefits listed under the Act. 29 USC § 1002(1)." Pet. App. 40a. The district court found that the sole purpose of VTEP was employee attrition, rather than providing its employees with benefits under the Act. Pet. App. 40a.

While not addressing the issue directly, the court of appeals also indicated that ERISA pre-emption would be inappropriate because Respondents' state-law claims are only peripherally connected to the concerns addressed by ERISA." Pet. App. 19a n. 22. *See also, Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 100, n. 21 (1983) ("Some state actions may affect employee benefits plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan.").

which would transform the one-time benefit program into an ERISA benefit "plan." As the court of appeals said:

> The plan was not ongoing, nor was there any need for continuing administration of the payment program. . . .

Pet. App. 20a.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

RICHARD C. ROBERTS III
Counsel of Record
814 North President Street
Post Office Box 55882
Jackson, Mississippi 39296-5882
Telephone (601) 353-9455

EDWARD J. CURRIE, JR.
WHITMAN B. JOHNSON, III
STEEN, REYNOLDS, DALEHITE & CURRIE
315 Tombigbee Street
Post Office Box 900
Jackson, Mississippi 39205-0900
Telephone (601) 969-7054